No. 80-196

SEP 9 1980

MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CITY OF SAN DIEGO, THE CITY COUNCIL OF SAN DIEGO, VOYD BEIGHTS, Zoning Administrator,

Petitioners,

v.

METROMEDIA, INC., a corporation, doing business as Foster & Kleiser, and PACIFIC OUTDOOR ADVERTISING CO., INC., an Arizona corporation,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

BRIEF FOR RESPONDENTS IN OPPOSITION TO CONDITIONAL CROSS PETITION FOR A WRIT OF CERTIORARI

FLOYD ABRAMS
SUSAN E. FINE
MARTHA A. SCARF
CAHILL GORDON & REINDEL
80 Pine Street
New York, N. Y. 10005
(212) 825-0100

THEODORE B. OLSON
WAYNE W. SMITH
GIBSON, DUNN & CRUTCHER
515 South Flower Street
Los Angeles, Cal. 90071
(213) 488-7000

Attorneys for Respondents

September 9, 1980

Questions Presented

1. Did the California Supreme Court correctly construe the Federal Highway Beautification Act, 23 U.S.C. § 131, so as to conclude that the California Outdoor Advertising Act preempted the authority of the City of San Diego to require the removal, without compensation, of billboards located in commercial and industrial zones within 660 feet of Federal Interstate or primary highways?

2. Does the Federal Highway Beautification Act violate the Tenth Amendment to the United States Constitution?

TABLE OF CONTENTS

PAGE

Questions Presented i

Table of Authorities ii

Opinions Below 1

Jurisdiction 2

Constitutional, Statutory, and Regulatory Provisions Involved 2

Statement of the Case 2

Argument—

I. The Decision of the California Supreme Court as to the Meaning of the Federal Highway Beautification Act was Plainly Correct and Does Not Provide an Appropriate Basis for Granting the Conditional Cross Petition 8

II. The Federal Highway Beautification Act Is Consistent With the Tenth Amendment 20

Conclusion 23

Appendix 1a

Table of Authorities

Cases:

Ackerley Communications, Inc. v. *City of Seattle,* 92 Wash.2d 905, 602 P.2d 1177 (1979) (*en banc*), *appeal pending,* 48 U.S.L.W. 3839 (U.S. June 16, 1980) (No. 79-1969) 4, 6-7, 8

PAGE

Beame v. *Friends of the Earth*, 434 U.S. 1310 (1977) 21n

Lamm v. *Volpe*, 449 F.2d 1202 (10th Cir. 1971) 20n

Massachusetts v. *Mellon*, 262 U.S. 447 (1923) 22

National League of Cities v. *Usery*, 426 U.S. 833 (1976) 21n

Oklahoma v. *United States Civil Service Commission*, 330 U.S. 127 (1947) 20, 21n

Rome v. *United States*, 100 S.Ct. 1549 (1980)..... 21n

Steward Machine Co. v. *Davis*, 301 U.S. 548 (1937) 20

United States v. *Darby*, 312 U.S. 100 (1941) 20

Vermont v. *Brinegar*, 379 F.Supp. 606 (D.Vt. 1974) 14n, 20n, 22

Congressional Documents:

Highway Beautification and Scenic Road Program: Hearings on S.2084 Before Subcomm. on Public Roads of Senate Comm. on Public Works, 89th Cong., 1st Sess. (1965) 12n

Review of Highway Beautification: Hearings on H.R. 7797 Before Subcomm. on Roads of House Comm. on Public Works, 90th Cong., 1st Sess. (1967) 11n

H.R. Rep. No. 1084, 89th Cong., 1st Sess. (1965), *reprinted in* [1965] U.S. Code Cong. & Ad. News 3710 10, 11, 12

H.R. Rep. No. 713, 90th Cong., 1st Sess. (1967)..... 13

H.R. Rep. No. 95-1485, 95th Cong., 2d Sess. (1978), *reprinted in* [1978] U.S. Code Cong. & Ad. News 6565 15, 18-19

PAGE

H.R. Conf. Rep. No. 95-1797 (Oct. 14, 1978) 16

S.Rep. No. 709, 89th Cong., 1st Sess. (1965) 11, 12

S.Rep. No. 542, 90th Cong., 1st Sess. (1967) 11n, 13

Constitutional Provisions:

U.S. Constitution
Amend. I 3
Amend. X 2, 21
Amend. XIV 3

Statutes:

Cal. Bus. & Prof. Code
§§ 5200, *et seq.* (West 1974 & Supp. 1980) 2
§ 5412 (West Supp. 1980) 4, 5, 6, 7

Federal Highway Beautification Act, 23 U.S.C. § 131 (1976 & Supp. II 1978) .....*passim*

Surface Transportation Assistance Act of 1978, Pub.L. No. 95-599, 92 Stat. 2689 (pertinent section codified in 23 U.S.C. § 131 (Supp. II 1978)) .....*passim*

Other Authorities:

Cunningham, *Billboard Control Under the Highway Beautification Act of 1965*, 71 Mich.L.Rev. 1295 (1973) 13n

42 Op. Att'y Gen. 331 (1966) 14

55 Op. Cal. Att'y Gen. 1, No. 71-102 (1972) 5, 17n

No. 80-196

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CITY OF SAN DIEGO, THE CITY COUNCIL OF SAN DIEGO, VOYD BEIGHTS, Zoning Administrator,

Petitioners,

v.

METROMEDIA, INC., a corporation, doing business as Foster & Kleiser, and PACIFIC OUTDOOR ADVERTISING CO., INC., an Arizona corporation,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

BRIEF FOR RESPONDENTS IN OPPOSITION TO CONDITIONAL CROSS PETITION FOR A WRIT OF CERTIORARI

Opinions Below

The opinion of the Supreme Court of California (Appendix A of the Jurisdictional Statement filed by Metromedia, Inc. and Pacific Outdoor Advertising Co., Inc. in No. 80-195) is reported at 26 Cal.3d 848, 610 P.2d 407, 164 Cal. Rptr. 510 and set forth at A. 1a of the Appendix to the Jurisdictional Statement.* Previous opinions in the case are, as well, set forth in the Appendix to the Jurisdictional Statement and are described in the "Opinions Below" section thereof.

---

* References to "A.——a" are to the appropriate pages of the Appendix of the Jurisdictional Statement filed in No. 80-195.

Jurisdiction

The jurisdictional requisites are adequately set forth in the conditional cross petition.

Constitutional, Statutory, and Regulatory Provisions Involved

Pertinent provisions of the Tenth Amendment to the United States Constitution, the Federal Highway Beautification Act, 23 U.S.C. § 131 (1976 & Supp. II 1978), the California Business and Profesional Code Section 5412 (West 1974 & Supp. 1980), and San Diego Ordinance No. 10795 (New Series) are set forth in the conditional cross petition as Appendices E, F, G, H and I.

Statement of the Case

The Statement of the Case set forth in the Jurisdictional Statement filed by Metromedia, Inc. and Pacific Outdoor Advertising Co., Inc. in No. 80-195 contains the basic facts to which the parties have stipulated. In one such stipulation, the parties agreed that the amortization provisions of San Diego Ordinance No. 10795 "have no reasonable relationship to the fair market value, useful life or income generated by the signs and were not designed to have such a relationship." (A. 126a-27a, JS 34) In another, the parties stipulated that: "Many of the Plaintiffs' signs are within 660 feet and others are within 500 feet of Interstate or Federal Aid Primary highways and are designed to be viewed therefrom." (A. 126a, JS 31)

In these litigations, commenced by Metromedia, Inc. and Pacific Outdoor Advertising Co., Inc., an injunction was sought to enjoin enforcement of San Diego Ordinance No. 10795. The opinion of the Superior Court, concluding that

the ordinance was unconstitutional on First and Fourteenth Amendment grounds, did not pass on the issue of whether compensation would have been required to be paid for the removal of signs within 660 feet of Interstate or Federal-aid primary highways. (81a-97a)

The Court of Appeals, Fourth Appellate Department, which held that the San Diego Ordinance constituted "an unreasonable and arbitrary exercise of [San Diego's] police power" (A. 80a), stated, in part that:

> ". . . signs which abut interstate and primary highways are of state-wide concern because of their effect upon the state's right to federal highway funds. Undoubtedly the paramount legislative purpose prompting the California Legislature to enact the Outdoor Advertising Act was its concern not to lose California's share of federal highway funds and not to incur any penalty as a result of noncompliance with the Federal Highway Beautification Act (23 U.S.C. § 131, *et seq.*). Under the Act a state must enact laws providing 'effective control' of billboards or be subject to a penalty of 10% of its allocated federal highway funds during each year of noncompliance (23 U.S.C. § 131(b)). Section 131(g) of the Act provides that just compensation shall be paid upon removal of any outdoor advertising sign, display, or device lawfully erected under state laws. Section 131(b)'s requirement that states provide 'effective control' undoubtedly includes section 131(g)'s mandate for payment of 'just compensation.' (See 55 Op. Att'y Gen. 1) Thus enforcement of the City's ordinance requiring the removal of signs in this category without payment of compensation might well subject the State of California to the loss of 10% of the funds allocated by the federal government for highway construction purposes." (A. 78a)

After initially deciding that signs within commercial and industrial zones were exempt from the Act,* the California Supreme Court, upon rehearing, vacated its earlier opinion. (A. 1a-63a) Concluding that the decision in *Ackerley Communications, Inc.* v. *City of Seattle,* 92 Wash.2d 905, 602 P.2d 1177 (1979) *(en banc), appeal pending,* 48 U.S.L.W. 3839 (U.S. June 16, 1980) No. 79-1969 was misguided—a decision which was, in large part, premised upon the earlier ruling of the California Supreme Court itself—the California Court concluded that just compensation was required under the Act for removal of signs in industrial and commercial zones.

The California Supreme Court rested its decision upon what it aptly characterized as a "compelled" interpretation of the Federal Highway Beautification Act, 23 U.S.C. § 131 (the "Act"). (A. 34a)** The Act declares a national policy to induce states to establish and maintain "effective control" of outdoor advertising adjacent to the Interstate and primary highway systems by state action: (1) prohibiting erection and maintenance of outdoor advertising devices in certain specified non-commercial areas, (2) promoting the reasonable, orderly and effective display of outdoor advertising in commercial areas and (3) requiring payment of just compensation to the sign owner and land owner for structures covered by the Act, of which payment the Federal share is 75%.

The State of California chose to implement this national policy by a legislative enactment, Cal. Bus. & Prof. Code § 5412 (Petitioners' Appendix G-1) and by an agreement

---

* Petitioners' Appendix B, at B-23—B-27.

** A copy of a letter from the Federal Highway Administration (the "FHWA") to the California Supreme Court dated March 28, 1980, setting forth the position of the FHWA with respect to relevant interpretation of the Act is annexed hereto as Appendix A. (Pages of the Appendix to this brief are referred to as ("a.—a")).

entered into with the Secretary of Transportation on February 16, 1968. As the California Supreme Court stated, in articulating its conclusion that Section 5412 partially preempts the San Diego ordinance:

> "As the language of the section demonstrates, it requires payment of compensation only when such payment is necessary to comply with *federal law.* (See 55 Op. Cal. Att'y Gen. 1 (1972)) Analysis of the alleged preemptive effect of Section 5412, consequently, requires a review of the relevant federal statute, the Highway Beautification Act of 1965 (23 U.S.C. § 131), as amended in November of 1978 (see 92 Stat. 2700-2701)." (A. 29a; italics in original)

As the California Supreme Court explained, a 10 percent cut in Federal-aid highway funds is required under the Act for any state which fails to provide "effective control" of outdoor advertising signs, displays or devices within 660 feet of Federal-aid primary or Interstate highways.* (A. 29a-30a, *see* 23 U.S.C. § 131(b) at a. 10a-11a) "Effective control", as defined under subsection (c), in turn requires that all signs within 660 feet of Federal-aid primary and Interstate highways must be removed, "except for official and directional signs, signs advertising property for sale or lease, on-site advertising, landmark signs, and signs advertising free coffee."** (a. 11a-12a)

Subsection (d) affords any state the option to "agree with the Secretary of Transportation to permit signs whose size, lighting and spacing are consistent with customary usage in areas zoned commercial and industrial. . . ." (a. 12a-13a) However, under subsection (g) of the statute,

---

* As the California Court noted, the Act's coverage extends, as well, to other signs not at issue in this litigation. (A. 29a-30a)

** The Federal Highway Beautification Act is printed as part of Appendix A to this brief at a.10a-18a.

"just compensation shall be paid upon the removal of *any* outdoor advertising sign, display or device lawfully erected under State law and not permitted under subsection (c) of this section, whether or not removed pursuant to this section." (a. 13a-14a, italics added)

The California Supreme Court concluded that signs within commercial and industrial areas do not fall within any exemption in subsection (c). It also concluded that although agreement may be reached under subsection (d) to permit signs to remain in "areas zoned commercial and industrial", no municipality may *remove* such signs without conforming to the compensation requirements of subsection (g) of the Act. Such an attempt is preempted by Cal. Bus. & Prof. Code § 5412 which implements the Act in California. The Court predicated its holding upon the explicit formulations of the Act's requirements by Congress itself:

> "The Report of the House Committee on Public Works and Transportation indicated that whenever a state or local government did not exercise its option to enter into an agreement with the Secretary of Transportation to protect signs in commercial and industrial areas, then no distinction could be drawn between signs which could be protected by agreement under subsection (d) and those which could not; 'all of the signs are nonconforming with the "effective control" requirements of subsection (c), and the committee is of the opinion that subsection (g) requires payment of just compensation for their removal . . . [J]ust compensation must be paid upon the removal of any lawfully erected sign which is not permitted under subsection (c).' (Report No. 95-1485, p. 16, U.S. Code Cong. & Admin. News 1978, pp. 6575, 6592)." (A. 34a-35a)

The Court considered and rejected the argument raised in *Ackerley Communications, Inc.* v. *City of Seattle, supra,*

that compensation was not required for signs removed from commercial and industrial zones. It concluded:

> "We must respectfully disagree with the analysis of *Ackerley*. In our opinion, the federal statute does regulate signs within commercial and industrial zones which are not governed by a federal-state agreement—specifically, the act prohibits such signs unless they fall within the five exempt categories of subsection (c). Consequently it requires compensation when those signs are removed." (A. 35a, footnote omitted.)

As the California Supreme Court recognized, "The literal language of the federal act therefore compels compensation." (A. 34a) And as the Court additionally decided, Section 5412 of the Cal. Bus. & Prof. Code requires the payment of just compensation by the state if such compensation is required under federal law. (A. 29a) The Court therefore held that San Diego's attempt to effect an uncompensated removal of signs in commercial and industrial areas for which compensation was required jeopardized the state's receipt of federal highway funds, and was thus preempted by state law. (A. 38a-39a)

The Court also considered and rejected an argument that the Act violated the Tenth Amendment.

ARGUMENT

I.

The Decision of the California Supreme Court as to the Meaning of the Federal Highway Beautification Act Was Plainly Correct and Does Not Provide an Appropriate Basis for Granting the Conditional Cross Petition.

At the outset, we do not quarrel with the proposition that the ruling of the California Supreme Court with respect to compensation is inconsistent with that of the Supreme Court of Washington in *Ackerley Communications, Inc.* v. *City of Seattle*, 92 Wash.2d 905, 602 P.2d 1177 (1979) *(en banc)*, *appeal pending*, 42 U.S.L.W. 3839 (U.S. June 16, 1980) (No. 79-1969). If that inconsistency were in and of itself sufficient to warrant the granting of the conditional cross petition, there would be little more to argue at this time. But the inconsistency, although relevant, is hardly dispositive. For one thing, the *Ackerley* ruling relies in large part on the very opinion of the California Supreme Court which that Court later vacated. The basic inconsistency is therefore one which is, in effect, between the initial opinion in this case and the later one.

Moreover, the Federal Highway Administration promptly and vigorously disavowed the interpretation of the Washington Supreme Court, stating that:

> "Signs in commercial and industrial areas are not exempted from control under section 131(c), but are treated separately in section 131(d). The underlying controls of section 131(c) continue to apply to signs permitted by section 131(d)." * Letter of Edward V.

---

* A copy of this correspondence, which was filed with the California Supreme Court, is annexed hereto as Appendix B.

A. Kussy, Deputy Assistant Chief Counsel, Federal Highway Administration.

The Federal Highway Administration responded in this case, as well, to a similar contention. When asked by the California Supreme Court itself about "the compensability of signs in commercial and industrial areas" (a. 1a) the FHWA response was unequivocal:

> "Federal law rejects the use of amortization to remove lawfully erected signs adjacent to the two controlled highway systems. The compensation requirements are set forth in 23 U.S.C. 131(g). Thus, owners of signs lawfully erected which do not conform to section 131(c) must receive compensation upon removal if a State is to be in compliance with Federal law. Signs in commercial and industrial areas that are permitted under section 131(d) but do not conform to section 131(c) would also fall within the compensation requirements of section 131(g). Failure to provide compensation in accordance with Federal requirements could subject a State to a 10 percent reduction of its Federal-aid highway apportionment. 23 U.S.C. 131(b)." Letter of Lorenzo Casanova, Chief Counsel of the Federal Highway Administration. (a. 2a)

As the California Supreme Court correctly noted, "Since the Federal Highway Administration is the agency charged with the enforcement of the Highway Beautification Act, its interpretation of the Act merits great weight. (*See, e.g., Northern Ind. Pub. Serv. Co.* v. *Walton League* (1975), 423 U.S. 12, 15, 96 S.Ct. 172, 173, 46 L.Ed.2d 156. . . .)" (A. 36a)

Based on just such a straightforward reading of the statute, the California Supreme Court correctly con-

cluded that "the literal language of the federal act therefore compels compensation" upon removal of advertising displays within commercial and industrial areas covered by the Act. (A. 34a) The Court recognized that it was not presented with a question of interpretation, but a "compelled" conclusion, one mandated by prior legislative history, interpretive pronouncements, and ultimately, the literal language of the Act itself.

In enacting the Federal Highway Beautification Act and in its subsequent history, Congress sought an even-handed solution to the issue of outdoor advertising regulation. While the Administration and Congress desired the complete removal of outdoor advertising signs in certain rural and scenic areas, they recognized the value of outdoor advertising as a means of communication in areas where commerce and industry took place and enacted subsection (d) which allowed the states to leave signs in place in commercial and industrial areas if they chose to do so, subject to regulations concerning size, height and spacing. This was based upon the understanding that outdoor advertising was a highly useful medium.

Both the Johnson Administration and the Congress made clear their conclusion that the outdoor "advertising industry . . . is an *important and legitimate business enterprise*" and that that conclusion was "essential to any evaluation of this legislation." H.R. Rep. No. 1084, 89th Cong., 1st Sess. (1965), *reprinted in* [1965] U.S. Code Cong. & Ad. News 3710, 3712 (emphasis added). Secretary of Commerce Connor expressly noted that the new federally assisted highways were "opening up vast areas of inestimable value for commercial and industrial activities." (Letter of John T. Connor, Secretary of Commerce, *reprinted in* H.R. Rep. No. 1084, *supra*, [1965] U.S. Code Cong. & Ad. News at 3714).

In this context, Secretary Connor stated that if the states chose to permit outdoor advertising in these areas, he contemplated developing "standards for outdoor advertising [which] would be aimed at assuring a pattern of reasonable development. . . ." *Id.* The Senate Committee on Public Works in turn stated that "outdoor advertising is an integral part of the business and marketing function and an established segment of the national economy; as a legitimate business, it should therefore be allowed to operate where other industrial and commercial activities are conducted."* S. Rep. No. 709, 89th Cong., 1st Sess. 6 (1965). It is simply beyond cavil that, as the testimony cited above illustrates, outdoor advertising in commercial and industrial areas was expected to continue to exist.

It is equally evident that mandatory compensation is the *only* method of compensation which Congress has ever permitted under what is now Section 131(g) of the Act—including, but not limited to, the removal of outdoor advertising in industrial and commercial areas. The 1965

---

* Two years later during review of this legislation and consideration of proposed amendments, the Report of the Senate Committee reiterated this same view:

> "The legitimate needs of business were recognized by providing that advertising signs, displays, and devices along the Interstate and primary systems would be allowed in zoned and unzoned industrial and commercial areas. . . ." S. Rep. No. 542, 90th Cong. 1st Sess. 2 (1967),

following and taking note of the testimony of Federal Highway Administrator Lowell Bridwell's testimony before the House Subcommittee that:

> "The Highway Beautification Act of 1965 . . . specifically recognizes the rightful place of outdoor advertising by stating it shall be permitted and in fact, promoted within zoned and unzoned commercial and industrial areas. . . ." *Review of Highway Beautification: Hearings on H. R. 7797 before Subcomm. on Roads of House Comm. on Public Works,* 90th Cong., 1st Sess. 938 (1967).

measure, as originally introduced was administration-sponsored and proposed an amortization approach as a substitute for compensation. That was firmly rejected by Congress, S. Rep. No. 709, 89th Cong., 1st Sess. 7 (1965); H.R. Rep. No. 1084, 89th Cong., 1st Sess. 2, 10 (1965), *reprinted in* [1965] U.S. Code Cong. & Ad. News at 3712, 3719. The latter states (p. 10):

> "The Committee intends, once again, as in dealing with billboard control, that 'safety' referred to in this section is not in any way intended to allow the exercise of police powers under this legislation so as to prevent the payment of compensation which is authorized to be paid by this bill." *

In the 90th Congress, proposals were advanced to make compensation permissive rather than mandatory. On the Senate side, the Committee Report expressed firm views regarding the compensation provision:

> "The issue of compensation for those affected by the required removal of signs was raised during the hearings. Proposals were presented to repeal the provisions of section 131(g) in their entirety or to make such compensation permissive rather than mandatory. The Committee discussed this matter and reaffirmed its belief that mandatory compensation was neces-

---

* In fact, the original wording of subsection 101(g) of the Act (23 U.S.C. Sec. 131(g)) was as follows:

> "'(g) Whenever a State shall submit evidence satisfactory to the Secretary that it is unable to secure effective control, as herein provided, under its police powers, Federal-aid funds may be used to pay the Federal pro-rata share of costs of providing effective control by purchase or condemnation.'" *Highway Beautification and Scenic Road Program: Hearings on S. 2084 Before Subcomm. on Public Roads of Senate Comm. on Public Works*, 89th Cong., 1st Sess. 2 (1965).

> sary as a matter of simple justice." S. Rep. No. 542, 90th Cong., 1st Sess. 10 (1967).

The House Committee on Public Works, at this same session, in its Report was equally dedicated to the concept of compensation:

> "Section 131(g) . . . of the Highway Beautification Act of 1965, clearly and unequivocally requires that just compensation shall be paid upon the removal of certain specifically described outdoor advertising . . . other alternative methods of handling the compensation requirement, including amortization, were considered and rejected when the . . . Act was enacted." H.R. Rep. No. 713, 90th Cong. 1st Sess. 5 (1967).*

In 1966, the United States Secretary of Commerce requested from the Attorney General an opinion regarding the ability of states to use their police power to remove structures without paying compensation and avoid the 10% penalty. Acting Attorney General Clark examined the legislative history of the Act carefully and concluded that the wording of section 131(g) was intended to leave no room for a penalty-free election of noncompliance with the directive that the states provide for, and bear part of the expense of, just compensation. He concluded that "the

---

* The most comprehensive legal analysis of the Federal Highway Beautification Act summarizes:

> "Without exception, these hearings and floor debates [from 1967 through 1969] reinforce the conclusion that Congress intended to require the payment of compensation upon removal of advertising signs as a condition of avoiding the ten per cent penalty." Cunningham, *Billboard Control Under the Highway Beautification Act of 1965*, 71 Mich.L.Rev. 1295, 1312 (1973) (footnote omitted).

mandatory aspect of Section 131(g) was well understood by the members of Congress. . . ." * 42 Op. Att'y Gen. 331, 333-34 (1966).

That Congress had no intention of excluding industrial and commercial zones from its guarantee of just compensation was made clear by its passage of the Surface Transportation Assistance Act of 1978 (Pub. L. No. 95-599, 92 Stat. 2689 (pertinent section codified in 23 U.S.C. § 131 (Supp. II 1978))). The amendments were intended to answer the precise question raised by this litigation. In fact, the House Public Works Committee answered the very arguments raised by San Diego in its petition:

> "In some instances, actions have been taken to remove signs, without the payment of just compensation, which could be retained in zoned and unzoned industrial and commercial areas under the provisions of subsection (d) of section 131, title 23, United States Code. Subsection (c) of section 131 establishes the requirements for 'effective control' pursuant to the Highway Beautification Act by limiting signs, displays, and devices which may be erected and maintained adjacent to the Interstate system and the

---

* A State judicial challenge to the constitutionality of the Federal Act was initiated by Vermont which had passed legislation prohibiting outdoor advertising on private property adjacent to all segments of all highways in the State. *Vermont* v. *Brinegar*, 379 F.Supp. 606 (D. Vt. 1974). In approving a ruling of the Secretary of Transportation that the State's policy not to pay just compensation constituted a failure to establish "effective control" within the meaning of the Federal Act, the Court stated that:

> ". . . just compensation for signowners affected by the Act was a foremost congressional consideration as both the mandatory language of Subsection (g) of Section 131 and the legislative history reveal. We believe that the compensation of signowners is an integral aspect of the statutory scheme and is a policy that is 'legitimately national.'" *Id.* at 616.

Federal-aid primary system. . . . To promote the reasonable, orderly, and effective display of outdoor advertising, while remaining consistent with the purposes of the Highway Beautification Act, subsection (d) of section 131 permits an exemption from the 'effective control' under subsection (c) for signs, displays, and devices whose size, lighting, and spacing are consistent with customary use as determined by agreement between the States and the Secretary, or by the State, county or local zoning authority, within zoned and unzoned industrial and commercial areas. State and local authorities have the discretion whether or not to implement this exemption."

"If a State or *local government does not exercise the exemption in subsection (d)* to permit signs that are consistent with customary use of size, lighting, and spacing to be erected and maintained, then *there is no distinction between signs in industrial and commercial areas. Except for the four classes of signs permitted by subsection (c), all of the signs are nonconforming with the 'effective control' requirements of subsection (c), and the committee is of the opinion that subsection (g) requires payment of just compensation for their removal.* It would be grossly inequitable to pay compensation for removal of signs in industrial and commercial areas which are not consistent with customary use of size, lighting, and spacing, but not pay for the removal of signs in such areas which would be consistent with such customary use except for the failure of the State or local government to exercise the exemption permitted by subsection (d)." H. R. Rep. No. 95-1485, 95th Cong., 2d Sec. 14-16 (1978), *reprinted in* [1978] U.S. Code Cong. & Ad. News 6591-92 (emphasis added).

The House and Senate versions of the proposed amendments were sent to conference and, in conference, the House version was adopted. *See* H.R. Conf. Rep. No. 95-1797 at 97 (Oct. 14, 1978).

That Congress had directed its just compensation requirement to apply to industrial and commercial areas has been repeatedly underscored by the Federal Highway Administration. Not only did the FHWA so inform the California Supreme Court but when the Oregon Assistant Attorney General inquired of the FHWA whether "the amendments to the Highway Beautification Act restrict the ability of cities and counties to remove . . . outdoor advertising signs . . . located in commercial or industrial zones," the FHWA responded:

> "The amendments to Title 23 sections 131(g) and 131(k) very clearly require the payment of just compensation upon the removal of any signs adjacent to the Interstate and Federal-aid primary systems which are not permitted under 23 U.S.C. section 131(c). The legislative history makes clear that the use of amortization by State or local authority would not be in conformance with 23 U.S.C. section 131(g). *Thus, when a sign is located in a commercial and industrial area adjacent to a controlled highway, compensation must be forthcoming upon removal.* If the State is unable to prevent such removal by local authorities, the State would not be in compliance with the Highway Beautification Act and would be subject to the penalty provisions of 23 U.S.C. Section 131(b)." Letter of Irwin L. Schroeder, Assistant Chief Counsel of the Federal Highway Administration (emphasis added).*

---

* A copy of this letter, as submitted to the California Supreme Court, is annexed hereto as Appendix C.

It is thus plain that a state has the option: (a) of establishing and maintaining "effective control", including, *inter alia,* the payment of just compensation for the removal of outdoor advertising within 660 feet of any "controlled" highway—including such a highway within a commercial or industrial zone—thus, preserving its Federal highway apportionment annually, *or* (b) making its own arrangements for the regulation of outdoor advertising, without reference to the national policy as reflected in 23 U.S.C. § 131, and suffering the penalty of an annual reduction of 10% of its Federal-aid highway funds. California chose the first option. It specifically responded to the Federal Act by legislative enactment for the purpose of preserving its full share of Federal funds. But "effective control" must be maintained under the statute, 23 U.S.C. §§ 131(a), (b), and compensation paid, 23 U.S.C. § 131(g). The State having so legislated and agreed, the San Diego Ordinance requiring amortization of—but no compensation for—nonconforming structures adjacent to the Interstate and primary systems was interdicted. The Ordinance jeopardized Federal highway funds for the entire state for all its highways. This was expressly recognized by the Supreme Court of California, which therefore correctly concluded that the San Diego Ordinance was partially preempted by state law. (A. 28a-29a)*

In light of the above, it is all the more remarkable that petitioners should themselves rely upon, as their concededly

---

* The California Court's conclusion was not only mandated if California wished to fulfill its agreement under 23 U.S.C. § 131, but had been earlier recognized as the necessary interpretation of California's implementing legislation. The Attorney General of California had ordered the Sacramento County Board of Supervisors not to utilize its police power to force the removal of nonconforming structures by amortization in order to avoid the 10% penalty against the State. 55 Op. Cal. Att'y Gen. 1, No. 71-102 (1972).

sole "authority" for the statutory "interpretation" they urge, a single letter from the Office of the Chief Counsel of the Federal Highway Administration on March 11, 1976. Petitioners acknowledge that even this supposed authority was expressly revoked by a letter on December 5, 1978. (a. 8a-9a) It is precisely because of that revocation, due to Congressional clarification of the Act in 1978, that the Supreme Court of California vacated its previous opinion in this case and upon rehearing, conformed its interpretation of the Act to that required by Congress. Yet on the basis of an expressly revoked letter, petitioners contend that this Court should grant their conditional cross petition and then interpret an Act of Congress contrary to its explicit terms.

Equally express statements by Congress rebut petitioners' argument that the 1978 amendments to the Act are not retroactive.* Congress has clearly stated that the amendments merely served to make explicit what Congress had previously assumed to be implicit in the Act—that municipalities may not, merely by denominating an action as pursuant to the police power, eviscerate a congressional regulatory scheme. As the Report of the House Committee on Public Works and Transportation noted:

> "Subsections (a) and (b) of Section 116 [subsections (g) and (k) of Section 131] would *clarify existing law* to make sure that just compensation is paid upon the removal of any lawfully erected sign which does not conform with the requirements for 'effective control' under the Highway Beautification Act." H.R. Rep. No. 95-1485, 95th Cong., 2d Sess. 14 (1978), *reprinted in*

---

* We need do no more than note, as did the Supreme Court of California in a footnote to its decision, A. 36a, n. 26, that the 1978 amendments govern regardless of their retroactivity since the signs in question were signs either in existence in 1978, or subject to litigation on that date.

[1978] U.S. Code Cong. & Ad. News 6565, 6592 (emphasis added).

The Federal Highway Administration has mirrored this conclusion:

> "Section 131(g) took its present form as the result of amendments contained in section 122 of the Surface Transportation Act of 1978, Pub. L. 95-599, November 6, 1978. We have interpreted the 1978 amendments to reach all lawfully erected signs in existence on November 6, 1978, all lawfully erected signs which were removed prior to November 6, but were still the subject of litigation on that date, and all signs lawfully erected thereafter." (a. 2a)

It is this explicit expression of congressional intent and administrative interpretation with which San Diego differs. But such a difference is less one as to law—which we submit, is plain—than as to what policy Congress should, in the view of San Diego, have adopted. It hardly provides a basis for granting the conditional cross petition.

II.

The Federal Highway Beautification Act Is Consistent With the Tenth Amendment.

No decision of this Court has ever reached the alternative conclusion that San Diego urges here: that legislation such as the Federal Highway Beautification Act violates the Tenth Amendment. Using the standard applied by this Court in *United States* v. *Darby,* 312 U.S. 100, 124 (1941) that the Tenth Amendment does not "depriv[e] the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end," decisions have uniformly recognized that mere inducement by Congress to follow a national policy cannot amount to "coercion" . . . "under the strain of a persuasion equivalent to undue influence. . . ." *Steward Machine Co.* v. *Davis Collector of Internal Revenue,* 301 U.S. 548, 590 (1937).

The Federal Highway Beautification Act is similar to the long line of Congressional enactments approved by this Court in which Congress has conditioned the receipt of funds upon the states' performance of certain statutory criteria.* For example, in *Oklahoma* v. *United States Civil Service Commission,* 330 U.S. 127 (1947), the State of Oklahoma challenged the decision of the United States Civil Service Commission to deprive the state of a portion of its federal highway funds because a state highway administrator had violated the Hatch Political Activity Act.

---

* Each Court that has considered the issue, as well as the Attorney General in his advisory opinion, has followed this reasoning in response to Tenth Amendment challenge. *See e.g. Metromedia* v. *City of San Diego,* A. 39a, n.28; *Vermont* v. *Brinegar,* 379 F.Supp. 606, 616 (D. Vt. 1974); *Lamm* v. *Volpe,* 449 F.2d 1202, 1203 (10th Cir. 1971); 42 Op. Att'y Gen. 331, 338 (1966).

In upholding this conditioning of funds against Tenth Amendment challenge, the Court reiterated:

> "While the United States is not concerned with, and has no power to regulate, local political activities as such of state officials, it does have power to fix the terms upon which its money allotments to states shall be disbursed." *Id.* at 143.*

The Court also noted:

> "The offer of benefits to a state by the United States dependent upon cooperation by the state with federal plans, assumedly for the general welfare, is not unusual." 330 U.S. at 144 (footnote omitted).

Since compensation of sign owners is a primary objective of the Federal Highway Beautification Act, Congress plainly has the power to effectuate the relationship between the overall goals of its highway aid program, through "effective control" over advertising displays and set the terms of its grant accordingly.

By legislative enactment and agreement with the Department of Transportation, the State of California de-

---

* Despite the City of San Diego's citation to and reliance upon *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), a decision that explicitly rests upon the Commerce Clause of the Constitution, in that decision this Court was addressing the far more intrusive congressional extension of the Fair Labor Standards Act to cover state employees—an enactment akin to a direct attempt to "regulate local political activities." *Oklahoma* v. *United State Civil Service Commission, supra*, 330 U.S. at 143. Both in *Usery* and subsequent cases, this Court has recognized that the Court there faced the direct "displace[ment of] the States' freedom to structure integral operations in areas of traditional governmental function" 426 U.S. at 852. *See also Rome* v. *United States*, 100 S.Ct. 1549, 1563 (1980), *Beame* v. *Friends of the Earth*, 434 U.S. 310 (1977) (Marshall, J., opinion in chambers). No such issue is raised here.

cided to entitle itself to a 75 percent federal contribution to the cost of just compensation for sign owners. That Congress influenced this choice is of no consequence. As this Court stated in *Massachusetts* v. *Mellon*, 262 U.S. 447 (1923):

> "If Congress enacted [the statute] with the ulterior purpose of tempting [the states] to yield, that purpose may be effectively frustrated by the simple expedient of not yielding." *Id.* at 482.

California possessed the option of accepting the ten percent penalty and making its own arrangements for the regulation of billboards. It simply cannot be said, especially "when considered in relation to a state's entire allocation of Federal highway aid" that such a penalty "irresistably compels a state under threat of economic catastrophe to embrace the federal plan." *Vermont* v. *Brinegar*, 379 F.Supp. 606, 617 (D. Vt. 1974).

The assertion of Tenth Amendment rights by San Diego in this litigation is thus totally unsound, one which can hardly justify the granting of the conditional cross petition.

CONCLUSION

The Court should note probable jurisdiction in No. 80-195 and should deny the conditional cross petition sought in 80-196.

Respectfully submitted,

FLOYD ABRAMS
SUSAN E. FINE
MARTHA A. SCARF
CAHILL GORDON & REINDEL
80 Pine Street
New York, N. Y. 10005
(212) 825-0100

THEODORE B. OLSON
WAYNE W. SMITH
GIBSON, DUNN & CRUTCHER
515 South Flower Street
Los Angeles, Cal. 90071
(213) 488-7000

Attorneys for Respondents

September 9, 1980

APPENDIX

INDEX TO APPENDIX

PAGE

APPENDIX—

A. Letter of Lorenzo Casanova, Chief Counsel of the Federal Highway Administration, to the California Supreme Court (March 28, 1980) 1a

B. Letter of Edward V. A. Kussy, Deputy Assistant Chief Counsel of the Federal Highway Administration, to the parties involved in *Ackerley Communications* v. *City of Seattle* 19a

C. Letter of Mr. Louis E. Lybecker, Regional Federal Highway Administrator, to the Regional Federal Highway Administrator of Oregon (February 27, 1979) 28a

APPENDIX A

U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL HIGHWAY ADMINISTRATION
Washington, D.C. 20590

28 MAR 1980

Mr. J. L. Kavanagh
Chief Deputy Clerk
Supreme Court of California
4250 State Building
San Francisco, California 94102

RE: *Metromedia, Incorporated* v. *City of San Diego,* Sup. Ct. of California, No. L.A. 30782

Dear Mr. Kavanagh:

By letter of January 17 to Mr. Edward Kussy, Deputy Assistant Chief Counsel for Right-of-Way and Environmental Law, you asked what the position of the Department of Transportation was with respect to the compensability of signs in commercial and industrial areas. We indicated by letter of January 25 that we would require approximately 60 days in which to reply.

The Highway Beautification Act, 23 U.S.C. 131, requires States to control signs adjacent to Interstate and Federal-aid primary highways. The required controls are set forth in 23 U.S.C. 131(c). The law also allows States to retain signs in commercial and industrial areas which conform to a State/Federal agreement regulating the size, lighting and spacing of the signs in these areas. 23 U.S.C. 131(d).

Appendix A

Federal law rejects the use of amortization to remove lawfully erected signs adjacent to the two controlled highway systems. The compensation requirements are set forth in 23 U.S.C. 131(g). Thus, owners of signs lawfully erected which do not conform to section 131(c) must receive compensation upon removal if a State is to be in compliance with Federal law. Signs in commercial and industrial areas that are permitted under section 131(d) but do not conform to section 131(c) would also fall within the compensation requirements of section 131(g). Failure to provide compensation in accordance with Federal requirements could subject a State to a 10 percent reduction of its Federal-aid highway apportionment. 23 U.S.C. 131(b).

Section 131(g) took its present form as the result of amendments contained in section 122 of the Surface Transportation Act of 1978, Pub. L. 95-599, November 6, 1978. We have interpreted the 1978 amendments to reach all lawfully erected signs in existence on November 6, 1978, all lawfully erected signs which were removed prior to November 6, but were still the subject of litigation on that date, and all signs lawfully erected thereafter.

We have enclosed memoranda dated December 5, 1978, March 5, 1979, and March 6, 1979, which address these matters. Also enclosed for the court's convenience is a copy of 23 U.S.C. 131, as recently amended by Pub. L. 95-599.

Appendix A

We appreciate this opportunity to comment. As you requested, all parties to the above litigation have been sent copies of this letter.

Sincerely yours,

Lorenzo Casanova

Lorenzo Casanova
Chief Counsel

4 Enclosures

cc: Mr. John W. Witt
City Attorney
Litigation Division
233 "A" Street
San Diego, CA 92101

Messrs. Higgs, Fletcher & Mack
707 Broadway
San Diego, CA 92112

Messrs. Hillyer & Irwin
530 "B" Street
San Diego, CA 92101

Messrs. Gibson, Dunn & Crutcher
515 South Flower Street
Los Angeles, CA 90071

Messrs. Snell & Wilmer
201 North Central
Phoenix, Arizona 85073

Appendix A

UNITED STATES GOVERNMENT DEPARTMENT OF TRANSPORTATION

Memorandum Federal Highway Administration

Date: March 6, 1979

Subject:

Just Compensation for Signs

From:

Federal Highway Administrator

To:

Regional Federal Highway Administrators, Regions 1-10, Regional Engineer, Region 15

On December 5, 1978, a memorandum was issued to all Regional Administrators to explain the impact of the 1978 amendments to the Highway Beautification Act contained in the Surface Transportation Assistance Act, P.L. 95-599, November 6, 1978.

Since its issuance, that memorandum has been the subject of considerable discussion with the House Committee on Public Works and Transportation. The Committee has expressed concern that the December 5 memorandum does not reflect the true scope of the 1978 amendments.

Attached is a memorandum by the Chief Counsel which deals with the concerns raised by the Committee. Thus, it should be clear that all lawfully erected signs still in existence on November 6, 1978, and those additional signs which were removed prior to November 6, 1978, but were the subject of litigation pending on that date are entitled to compensation under 23 U.S.C. 131(g) and (k).

Appendix A

We will be issuing several notices over the next few weeks concerning the outdoor advertising control program. It is hoped that this memorandum will assist you in interpreting those notices.

/s/ KARL S. BOWERS
Karl S. Bowers

Attachment

Appendix A

UNITED STATES GOVERNMENT DEPARTMENT OF TRANSPORTATION
Memorandum Federal Highway Administration

Date: MAR 5 1979

Subject:
INFORMATION: Just Compensation for Signs

From: Chief Counsel

To: Mr. Karl S. Bowers
Federal Highway Administrator

On December 5, 1978, you issued a memorandum to all Regional Administrators to explain the impact of sections 122(a) and 122(b) of the Surface Transportation Assistance Act of 1978, amending 23 U.S.C. section 131 (g) and (k).

That memorandum indicated, among other things, that:

> "the statute requires the States to provide just compensation upon the removal of signs *legally in existence* on or after November 6, 1978, the effective date of the 1978 amendments, which do not conform to the definition found at 23 U.S.C. section 131(c) if they wish to remain in compliance with the Highway Beautification Act." [Emphasis added.]

The House Committee on Public Works and Transportation has indicated that this language does not accurately reflect the true scope of the 1978 amendments. Accordingly, the statute is to be interpreted to require the States to provide compensation upon removal of signs which were lawfully erected under State law. As a matter of administrative policy, the FHWA will not require the payment of just compensation for signs that

were not in existence on November 6, 1978, except for any such signs that were the subject of pending litigation on that date. Failure to provide compensation for signs that are subject to pending litigation or in existence on November 6, 1978, will be in violation of 23 U.S.C. section 131(b), exposing a State to reduction of its Federal highway apportionment.

/s/ Lorenzo Casanova
Lorenzo Casanova

Appendix A

UNITED STATES GOVERNMENT

Memorandum

DEPARTMENT OF TRANSPORTATION
FEDERAL HIGHWAY ADMINISTRATION

Date: December 5, 1978

Subject: INFORMATION: Just Compensation for Signs

From: Federal Highway Administrator

To: Regional Administrators

Regions 1-10 and 15

Sections 122(a) and 122(b) of the Surface Transportation Assistance Act of 1978 amended sections 131(g) and (k) of title 23, U.S.C. to read as follows:

(g) Just compensation shall be paid upon the removal of any outdoor advertising sign, display, or device lawfully erected under State law *and not permitted under subsection (c)* of *this section, whether or not removed pursuant to or because of this section.* The Federal share of such compensation shall be 75 per centum. Such compensation shall be paid for the following:

(A) The taking from the owner of such sign, display, or device of all right, title, leasehold, and interest in such sign, display, or device; and

(B) The taking from the owner of the real property on which the sign, display, or device is located, of the right to erect and maintain such signs, displays, and devices thereon.

• • • • •

(k) [Nothing] *Subject to compliance with subsection (g) of this section for the payment of just com-*

pensation, nothing in this section shall prohibit a State from establishing standards imposing stricter limitations with respect to signs, displays, and devices on the Federal-aid highway systems than those established under this section.

[New language is underlined, stricken language is in brackets.]

These two amendments overrule an opinion on the subject of this memorandum by the Chief Counsel transmitted to your office by former Federal Highway Administrator Norbert T. Tiemann on December 8, 1976. Similarly affected are memorandums issued September 6, 1972 and December 13, 1974, dealing with ordinances in New Castle, Delaware and Madison, Wisconsin, on the above subject and withdrawn by the Chief Counsel in memorandums of June 20 and August 20, 1975. The statute requires the States to provide just compensation upon the removal of signs legally in existence on or after November 6, 1978, the effective date of the 1978 amendments, which do not conform to the definition found at 23 U.S.C. section 131(c) if they wish to remain in compliance with the Highway Beautification Act. As of November 6, 1978, non-compliance with the compensation requirement will subject a State to the penalty provisions as provided by Title 23, section 131(b).

Among other actions concerning the program is a proposed review of the entire outdoor advertising control program, including appropriate issuances in the Federal Register and public hearings. We anticipate sending out more specific guidance in this area in the very near future.

/s/ KARL S. BOWERS
Karl S. Bowers

Appendix A

23 U.S.C. § 131 as most recently amended:

§ 131. Control of outdoor advertising.

(a) The Congress hereby finds and declares that the erection and maintenance of outdoor advertising signs, displays, and devices in areas adjacent to the Interstate System and the primary system should be controlled in order to protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural beauty.

(b) Federal-aid highway funds apportioned on or after January 1, 1968, to any State which the Secretary determines has not made provision for effective control of the erection and maintenance along the Interstate System and the primary system of outdoor advertising signs, displays, and devices which are within six hundred and sixty feet of the nearest edge of the right-of-way and visible from the main traveled way of the system, and Federal-aid highway funds apportioned on or after January 1, 1975, or after the expiration of the next regular session of the State legislature, whichever is later, to any State which the Secretary determines has not made provision for effective control of the erection and maintenance along the Interstate System and the primary system of those additional outdoor advertising signs, displays, and devices which are more than six hundred and sixty feet off the nearest edge of the right-of-way, located outside of urban areas, visible from the main traveled way of the system, and erected with the purpose of their message being read from such main traveled way, shall be reduced by amounts equal to 10 per centum of the amounts which would otherwise be apportioned to such State under section 104 of this

title, until such time as such State shall provide for such effective control. Any amount which is withheld from apportionment to any State hereunder shall be reapportioned to the other States. Whenever he determines it to be in the public interest, the Secretary may suspend, for such periods as he deems necessary, the application of this subsection to a State.

(c) Effective control means that such signs, displays, or devices after January 1, 1968, if located within six hundred and sixty feet of the right-of-way and, on or after July 1, 1975, or after the expiration of the next regular session of the State legislature, whichever is later, if located beyond six hundred and sixty feet of the right-of-way, located outside of urban areas, visible from the main traveled way of the system, and erected with the purpose of their message being read from such main traveled way, shall, pursuant to this section, be limited to (1) directional and official signs and notices, which signs and notices shall include, but not be limited to, signs and notices pertaining to natural wonders, scenic and historical attractions, which are required or authorized by law, which shall conform to national standards hereby authorized to be promulgated by the Secretary hereunder, which standards shall contain provisions concerning lighting, size, number, and spacing of signs, and such other requirements as may be appropriate to implement this section, (2) signs, displays, and devices advertising the sale or lease of property upon which they are located, (3) signs, displays, and devices, including those which may be changed at reasonable intervals by electronic process or by remote control, advertising activities conducted on the property on which they are located, (4) signs lawfully in existence on October 22,

1965, determined by the State, subject to the approval of the Secretary, to be landmark signs, including signs on farm structures or natural surfaces, of historic or artistic significance the preservation of which would be consistent with the purposes of this section, and (5) signs, displays, and devices advertising the distribution by nonprofit organizations of free coffee to individuals traveling on the Interstate System or the primary system. For the purposes of this subsection, the term "free coffee" shall include coffee for which a donation may be made, but is not required.

(d) In order to promote the reasonable, orderly and effective display of outdoor advertising while remaining consistent with the purposes of this section, signs, displays, and devices whose size, lighting and spacing, consistent with customary use is to be determined by agreement between the several States and the Secretary, may be erected and maintained within six hundred and sixty feet of the nearest edge of the right-of-way within areas adjacent to the Interstate and primary systems which are zoned industrial or commercial under authority of State law, or in unzoned commercial or industrial areas as may be determined by agreement between the several States and the Secretary. The States shall have full authority under their own zoning laws to zone areas for commercial or industrial purposes, and the actions of the States in this regard will be accepted for the purposes of this Act. Whenever a bona fide State, county, or local zoning authority has made a determination of customary use, such determination will be accepted in lieu of controls by agreement in the zoned commercial and industrial areas within the geographical jurisdiction of such authority. Nothing in this subsection shall apply to signs, displays, and de-

vices referred to in clauses (2) and (3) of subsection (c) of this section.

(e) Any sign, display, or device lawfully in existence along the Interstate System or the Federal-aid primary system on September 1, 1965, which does not conform to this section shall not be required to be removed until July 1, 1970. Any other sign, display, or device lawfully erected which does not conform to this section shall not be required to be removed until the end of the fifth year after it becomes nonconforming.

(f) The Secretary shall, in consultation with the States, provide within the rights-of-way for areas at appropriate distances from interchanges on the Interstate System, on which signs, displays, and devices giving specific information in the interest of the traveling public may be erected and maintained. The Secretary may also, in consultation with the States, provide within the rights-of-way of the primary system for areas in which signs, displays, and devices giving specific information in the interest of the traveling public may be erected and maintained. Such signs shall conform to national standards to be promulgated by the Secretary.

(g) Just compensation shall be paid upon the removal of any outdoor advertising sign, display, or device lawfully erected under State law and not permitted under subsection (c) of this section, whether or not removed pursuant to or because of this section. The Federal share of such compensation shall be 75 per centum. Such compensation shall be paid for the following:

(A) The taking from the owner of such sign, display, or device of all right, title, leasehold, and interest in such sign, display, or device; and

(B) The taking from the owner of the real property on which the sign, display, or device is located, of the right to erect and maintain such signs, displays, thereon.

(h) All public lands or reservations of the United States which are adjacent to any portion of the Interstate System and the primary system shall be controlled in accordance with the provisions of this section and the national standards promulgated by the Secretary.

(i) In order to provide information in the specific interest of the traveling public, the State highway departments are authorized to maintain maps and to permit information directories and advertising pamphlets to be made available at safety rest areas. Subject to the approval of the Secretary, a State may also establish information centers at safety rest areas and other travel information systems within the rights-of-way for the purpose of informing the public of places of interest within the State and providing such other information as a State may consider desirable. The Federal share of the cost of establishing such an information center or travel information system shall be that which is provided in section 120 for a highway project on that Federal-aid system to be served by such center or system.

(j) Any State highway department which has, under this section as in effect on June 30, 1965, entered into an agreement with the Secretary to control the erection and maintenance of outdoor advertising signs, displays, and devices in areas adjacent to the Interstate System shall be entitled to receive the bonus payments as set forth in the agreement, but no such State highway department shall be

entitled to such payments unless the State maintains the control required under such agreement: *Provided,* That permission by a State to erect and maintain information displays which may be changed at reasonable intervals by electronic process or remote control and which provide public service information or advertise activities conducted on the property on which they are located shall not be considered a breach of such agreement or the control required thereunder. Such payments shall be paid only from appropriations made to carry out this section. The provisions of this subsection shall not be construed to exempt any State from controlling outdoor advertising as otherwise provided in this section.

(k) Subject to compliance with subsection (g) of this section for the payment of just compensation, nothing in this section shall prohibit a State from establishing standards imposing stricter limitations with respect to signs, displays, and devices on the Federal-aid highway systems than those established under this section.

(l) Not less than sixty days before making a final determination to withhold funds from a State under subsection (b) of this section, or to do so under subsection (b) of section 136, or with respect to failing to agree as to the size, lighting, and spacing of signs, displays, and devices or as to unzoned commercial or industrial areas in which signs, displays, and devices may be erected and maintained under subsection (d) of this section, or with respect to failure to approve under subsection (g) of section 136, the Secretary shall give written notice to the State of his proposed determination and a statement of the reasons therefor, and during such period shall give the State an opportunity for a hearing on such determination.

Following such hearing the Secretary shall issue a written order setting forth his final determination and shall furnish a copy of such order to the State. Within forty-five days of receipt of such order, the State may appeal such order to any United States district court for such State, and upon the filing of such appeal such order shall be stayed until final judgment has been entered on such appeal. Summons may be served at any place in the United States. The court shall have jurisdiction to affirm the determination of the Secretary or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the United States court of appeals for the circuit in which the State is located and to the Supreme Court of the United States upon certiorari or certification as provided in title 28, United States Code, section 1254. If any part of an apportionment to a State is withheld by the Secretary under subsection (b) of this section or subsection (b) of section 136, the amount so withheld shall not be reapportioned to the other States as long as a suit brought by such State under this subsection is pending. Such amount shall remain available for apportionment in accordance with the final judgment and this subsection. Funds withheld from apportionment and subsequently apportioned or reapportioned under this section shall be available for expenditure for three full fiscal years after the date of such apportionment or reapportionment as the case may be.

(m) There is authorized to be appropriated to carry out the provisions of this section, out of any money in the Treasury not otherwise appropriated, not to exceed $20,000,000 for the fiscal year ending June 30, 1966, not to exceed $20,000,000 for the fiscal year ending June 30, 1967,

not to exceed $2,000,000 for the fiscal year ending June 30, 1970, not to exceed $27,000,000 for the fiscal year ending June 30, 1971, not to exceed $20,500,000 for the fiscal year ending June 30, 1972, and not to exceed $50,000,000 for the fiscal year ending June 30, 1973. The provisions of this chapter relating to the obligation, period of availability and expenditure of Federal-aid primary highway funds shall apply to the funds authorized to be appropriated to carry out this section after June 30, 1967.

(n) No sign, display, or device shall be required to be removed under this section if the Federal share of the just compensation to be paid upon removal of such sign, display, or device is not available to make such payment.

(o) The Secretary may approve the request of a State to permit retention in specific areas defined by such State of directional signs, displays, and devices lawfully erected under State law in force at the time of their erection which do not conform to the requirements of subsection (c), where such signs, displays, and devices are in existence on the date of enactment of this subsection and where the State demonstrates that such signs, displays, and devices (1) provide directional information about goods and services in the interest of the traveling public, and (2) are such that removal would work a substantial economic hardship in such defined area.

(p) In the case of any sign, display, or device required to be removed under this section prior to the date of enactment of the Federal-Aid Highway Act of 1974, which sign, display, or device was after its removal lawfully relocated and which as a result of the amendments made to this section by such Act is required to be removed, the

United States shall pay 100 per centum of the just compensation for such removal (including all relocation costs).

(q)(1) During the implementation of State laws enacted to comply with this section, the Secretary shall encourage and assist the States to develop sign controls and programs which will assure that necessary directional information about facilities providing goods and services in the interest of the traveling public will continue to be available to motorists. To this end the Secretary shall restudy and revise as appropriate existing standards for directional signs authorized under subsections 131(c)(1) and 131(f) to develop signs which are functional and esthetically compatible with their surroundings. He shall employ the resources of other Federal departments and agencies, including the National Endowment for the Arts, and employ maximum participation of private industry in the development of standards and systems of signs developed for those purposes.

(2) Among other things the Secretary shall encourage States to adopt programs to assure that removal of signs providing necessary directional information, which also were providing directional information on June 1, 1972, about facilities in the interest of the traveling public, be deferred until all other nonconforming signs are removed.

APPENDIX B

U.S. Department of Transportation
Federal Highway Administration
Washington, D.C. 20590

Mr. Eric M. Rubin
Wolf, Block, Schorr & Solis-Cohen
Eleventh Floor Connecticut Building
1150 Connecticut Avenue, N.W.
Washington, D.C. 20036

Dear Mr. Rubin:

This is in response to your letter of December 14 regarding a decision by the Supreme Court of Washington in *Ackerley Communications, Inc.* v. *City of Seattle* (No. 45281, November 21, 1979). You ask for an expeditious response because a petition of reconsideration is apparently pending before the court.

We have not been able to review the pleadings and factual background of this case and we have no specific knowledge of the precise nature of the signs at issue. Furthermore, since this matter is still under litigation, we will not comment on the merits of the case and will limit the answers to an explanation of the applicable Federal statute.

The Highway Beautification Act of 1965 as amended, 23 U.S.C. 131, defines the areas in which signs must be controlled. The areas subject to control include:

(1) Areas within 660 feet of the right-of-way of Interstate and Federal-aid primary highways.

(2) Areas outside of urban areas and beyond 660 feet of the right-of-way of Interstate and Federal-aid primary highways.

Appendix B

Signs within 660 feet (group 1) must be controlled if they are "visible" from main traveled way of such highways. Signs beyond 660 feet of the right-of-way of such highways and outside of urban areas (group 2) must be controlled if they are visible and erected with the purpose of their message being read from the main traveled way of the highway. Thus, *within* 660 feet of the right-of-way of such highways signs must be controlled whether or not they are in urban areas. Signs *in urban areas beyond* 660 feet of the right-of-way are not reached by the Act.

This reading of the Act is clearly supported by the legislative history of P.L. 93-643, which extended the control provisions of the Act to areas beyond 660 feet of the right-of-way. A copy of that Public Law and the House, Senate, and Conference Reports are enclosed for your information. We call your attention to section 109 of the Public Law, and pages 20-21 of the Conference Report, page 4 of the House Report, and page 13 of the Senate Report. Urban areas are defined in 23 U.S.C. §101(a).

It should be noted further that only signs adjacent to Interstate and Federal-aid primary highways must be controlled under Federal law. These highway systems are defined in 23 U.S.C. §103(e) and (b), respectively. Signs along highways not on either of these two systems or signs located beyond 660 feet of the rights-of-way of highways on these systems, if in urban areas, are not reached by the Act and are not subject to any of the Act's provisions.

There is a clear difference between 23 U.S.C. §131(c), the definition of effective control, and 23 U.S.C. §131(d), relating to signs in commercial and industrial areas. Section 131(c) exempts certain classes of signs from the effective

control provisions of the Act. In some cases, such as directional and official signs, regulatory provisions are required which impose controls. Other signs, such as "on property" or "for sale or lease" signs, are wholly uncontrolled by the Act (it should be noted that the 1958 "Bonus" law results in certain controls on these signs because Washington participates in the voluntary bonus program, 23 U.S.C. §131(j)).

Signs in commercial and industrial areas are not exempted from control under section 131(c), but are treated separately in section 131(d). The underlying controls of §131(c) continue to apply to signs permitted by section 131(d). See *South Dakota* v. *Volpe*, 353 F. Supp. 335 (D.S.D., 1973).

Signs within commercial and industrial areas are not required by Federal law to be removed if they conform to an agreement each State has with the Secretary regarding the size, lighting, and space of signs in the areas. This agreement also defines what is to be an "unzoned" commercial or industrial area. Section 131(d) allows local size, lighting, and spacing standards to govern in certain circumstances. Failure to have agreement does not result in no controls, but results in no special exemption for signs in commercial or industrial areas.

Washington's agreement provides for size, lighting, and spacing of newly erected signs, and allows signs existing on the date of the agreement in commercial and industrial areas to remain, even if they do not conform to these standards. The agreement did not exclude the pre-1971 signs in commercial and industrial areas, but merely recognized that it would be counter-productive to apply the new stan-

dards to them. Pre-1971 signs are treated as "grandfathered" signs. See 23 CFR §§750.706 and 750.707(c).

In 1978, the Congress amended the just compensation provisions of the Act, requiring that legally erected signs which do not conform to §131(c) must be paid for upon removal. See §122(a) and (b) of P.L. 95-599, November 6, 1978, copy enclosed. The legislative history of the 1978 Amendment indicates that the Congress sought to eliminate amortization as a means of removing signs in areas subject to the controls of the Act. This compensation requirement clearly extends to removals of signs in commercial and industrial areas, since these signs are "not permitted by §131(c)." This is made even more clear because the Senate initially sought to limit the extent of the 1978 Amendments by not requiring compensation upon removal in commercial and industrial areas (see S. Rept. 95-833, p. 14-15, copy enclosed). This approach was rejected by the Conference Committee in favor of the broader version eventually adopted (see the Conference Report (H. Rept. 95-1797), copy enclosed).

The specific reference to §131(c) in both the amendments to §§131(g) and 131(h) is deliberate. While compensation is not required for signs "conforming to", i.e., specifically permitted by, §131(c)(1)-§131(c)(5), compensation is clearly required for sign permitted under §131(d).

Our initial interpretation of the 1978 amendments was that property rights extinguished by operation of law prior to the effective date of the 1978 amendments were not within the ambit 23 U.S.C. §131(g) as amended. However, further review of the legislative history, coupled with very clear expressions of concern by the drafters of the 1978 Amendment in the Congress, indicated that extinguishment of property rights through amortization could not be used to

remove signs not permitted by §131(c), lawfully erected in areas subject to effective control under 23 U.S.C. §131.

We noted this in our memoranda of March 5 and March 6, 1979. Of course, States may continue to reasonably regulate outdoor advertising. A sign violating reasonable regulations may be terminated by operation of law. We have dealt with the continuing authority of States and localities to regulate billboards in a series of questions and answers regarding the 1978 Amendments. These are enclosed for your information.

Under the Highway Beautification Act, 23 U.S.C. §131(g), the payment of just compensation is part of effective control. Failure to provide compensation in accordance with § 131(g), as discussed in this letter, exposes a State to sanctions under §131(b). See *State of Vermont* v. *Brinegar*, 379 F. Supp. 606 (D. Vt., 1973).

We trust this answers your questions. We have provided copies of this letter to the State of Washington, the city of Seattle, and the parties to the lawsuit which is the subject of this letter.

Sincerely yours,

/s/ Edward V.A. Kussy
Deputy Assistant Chief Counsel
Right-of-Way and Environmental Law

Enclosures

cc:
Thomas Garlington—Chief Counsel
Ronald Schaps—Attorney for Ackerley Communications, Inc.
Charles Brown—Assistant City Attorney—Seattle, Washington

Appendix B

December 14, 1979

Edward V. A. Kussy
Deputy Assistant Counsel
Federal Highway Administration
400 C Street, S. W.
Washington, D. C. 20590

Dear Mr. Kussy:

I am writing to you on behalf of my client, the Outdoor Advertising Association of America. As you may already know, on November 21, 1979, the Supreme Court of the State of Washington rendered an opinion in *Ackerly Communications, Inc. et al.* v. *City of Seattle et al.* No. 45281, —— P. 2d —— (1979). A copy of the slip opinion is enclosed for your convenience.

At issue in this case is the validity of an ordinance promulgated by the City of Seattle which requires the removal, after a three year amortization period, of certain billboards which had been lawfully erected under state and local law. The ordinance further permits an extension of the amortization period for up to seven additional years and authorizes the granting of certain other variances.

In 1974 and 1975, the City of Seattle notified the plaintiff outdoor companies that certain of their signs were in violation of the ordinance and ordered their removal. The companies then initiated the instant action in which they sought a declaratory judgment that the ordinance was invalid and an order restraining further enforcement. The Superior Court granted summary judgment for the plaintiffs. However, the Supreme Court reversed the lower court in the above referenced decision, upholding

the validity of the ordinance on constitutional grounds and on the basis that the amortization provisions were not precluded by state or federal law.

The specific concern which the OAAA wishes to address to your Office pertains to that portion of the Washington Supreme Court's opinion interpreting the provisions of the Highway Beautification Act. In its decision, the Court egregiously misconstrues the Act, holding that signs located in commercial and industrial zones adjacent to federal-aid highways are outside the ambit of the statute and that just compensation is therefore not required upon their removal.

> We conclude, then, that the federal Highway Beautification Act does not require compensation for those outdoor signs not within the scope of its provisions for effective control. Since respondents' signs are indisputably in commercial and industrial areas of the City, which are not within the effective control provision of the act, and having been erected prior to 1971, are not covered by the agreement between the State of Washington and the Department of Transportation, it is clear that none of the provisions of the federal act, including the compensation requirement, apply to respondents' signs. *Slip opinion at p. 1011.*

As you are aware, that construction is contrary to the plain language of the statute and is inconsistent with the express Congressional intent evidenced in the legislative history underlying its enactment. It is also apparently wholly inconsistent with FHWA's interpretation of the statute. See Memorandum, *Oregon Highway Beautification Just Compensation for Outdoor Advertising Signs,*

Appendix B

Irvin Schroeder, Assistant Chief Counsel, FHWA to Robert Rutledge, Regional Counsel. February 27, 1979.

Accordingly, the OAAA requests that the Office of Chief Counsel provide specific clarification and guidance concerning the FHWA's continuing construction of the Beautification Act in light of the Washington Supreme Court's decision. In particular, we request your formal view regarding the status under the Act of billboards located in commercial and industrial zones and the eligibility of such lawfully erected signs for just compensation where ordered removed pursuant to a supervening law of a state or subdivision thereof. The OAAA also requests your confirmation that implementation of the Washington Court's decision would evoke the penalty provisions in the Act, thereby resulting in the withholding of 10% of highway funds earmarked for the State of Washington. 23 USC 131(b)

On December 11, 1979, the plaintiffs in *Ackerly Communications, Inc.* petitioned the Washington Court for a rehearing of this case. The OAAA strongly believes that a definitive interpretative statement from your Office would be of material assistance to the Court in its consideration of this petition. Moreover, we are advised that an FHWA construction of the Act and the potential ramifications of the Court's decision would provide useful guidance to Washington State government officials. Beyond this, the OAAA believes that a clear cut legal construction of the Act by your Office at this juncture would be instrumental in averting similar issues from arising in other jurisdictions in the future.

In view of the pendency of the petition now before the Washington Supreme Court, it is critical that your office

respond promptly within a few days to this request. The OAAA appreciates the Office of the Chief Counsel's attention and interest in this matter.

Sincerely,

/s/ Eric M. Rubin
Eric M. Rubin
For
Wolf, Block, Schorr and Solis-Cohen

APPENDIX C

UNITED STATES GOVERNMENT DEPARTMENT OF TRANSPORTATION

Memorandum Federal Highway Administration

Date: FEB 27 1979

Subject:
Oregon—Highway Beautification
Just Compensation for Outdoor
Advertising Signs

From:
Assistant Chief Counsel for
Right-of-Way and Environmental
Law Division

To:
Mr. Louis E. Lybecker
Regional Federal Highway Administrator

Attn:
Mr. Robert B. Rutledge
Regional Counsel

This is in response to your memorandum of January 30, 1979, transmitting a letter from Assistant Attorney General Sollis of Oregon, requesting a legal interpretation of the 1978 amendments to section 131 of Title 23.

The amendments to Title 23 sections 131(g) and 131(k) very clearly require the payment of just compensation upon the removal of any signs adjacent to the Interstate and Federal-aid primary systems which are not permitted under 23 U.S.C. section 131(c). The legislative history makes clear that the use of amortization by State or local authority would not be in conformance

with 23 U.S.C. section 131(g). Thus, when a sign is located in a commercial and industrial area adjacent to a controlled highway, compensation must be forthcoming upon removal. If the State is unable to prevent such removal by local authorities, the State would not be in compliance with the Highway Beautification Act and would be subject to the penalty provisions of 23 U.S.C. section 131(b).

If you have any questions with respect to this memorandum, please contact Mr. Kussy of my office.

/s/ IRWIN L. SCHROEDER
Irwin L. Schroeder